

Message Text

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TO AMEMBASSY ALGIERS

UNCLAS STATE 247074

FOLLOWING REPEAT THE HAGUE 5287 SENT SECSTATE INFO RABAT
MADRID NOUAKCHOTT USUN NEW YORK DATED OCT 16.

QUOTE

UNCLAS THE HAGUE 5278

UNCLAS SECTION 1 OF 4 THE HAGUE 5278

DEPT PASS ALGIERS AS APPROPRIATE

E.O. 11652: N/A

TAGU: PFOR, UNGA, ICJ, SS

SUBJECT: SPANISH SAHARA

1. ICJ HANDED DOWN ADVISORY OPINION IN SPANISH SAHARA CASE
OCTOBER 16. FOLLOWING IS EXTRACT OF OPINION AS ISSUED BY
COURT IN PRESS RELEASE. FULL TEXT BECNO POUCHED DEPARTMENT
FOR OFFICE OF LEGAL ADVISOR.

2. BEGIN TEXT:

TODAY, 16 OCTOBER 1975, THE INTERNATIONAL COURT OF JUSTICE
DELIVERED THE ADVISORY OPINION WHICH THE GENERAL ASSEMBLY OF THE
UNITED NATIONS HAD REQUESTED ON TWO QUESTIONS CONCERNING
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WESTERN SAHARA.

WITH REGARD TO QUESTION I, "WAS WESTERN SAHARA (RIO DE ORO AND
SAKIET EL HAMRA) AT THE TIME OF COLONIZATION BY SPAIN A TERRITORY

BELONG TO NO ONE (TERRA NULLIUS)?", THE COURT

DECIDED BY 13 TO 3 TO COMPLY WITH THE REQUEST FOR AN
ADVISORY OPINION;

IS UNANIMOUSLY OF OPINION THAT WESTERN SAHARA (RIO DE ORO AND
SAKIET EL HAMRA) AT THE TIME OF COLONIZATION BY SPAIN WAS NOT A
TERRITORY BELONGING TO NO-ONE (TERRA NULLIUS).

WITH REGARD TO QUESTION II, "WHAT WERE THE LEGAL TIES BETWEEN
THIS TERRITORY AND THE KINGDOM OF MOROCCO AND THE MAURITANIAN
ENTITY?"
THE COURT

DECIDED BY 14 VOTES TO 2 TO COMPLY WITH THE REQUEST FOR AN
ADVISORY OPINION;

IS OF OPINION, BY 14 VOTES TO 2, THAT THERE WERE LEGAL TIES
BETWEEN THIS TERRITORY AND THE KINGDOM OF MOROCCO OF THE KINDS
INDICATED IN THE PENULTIMATE PARAGRAPH OF THE ADVISORY OPINION;

IS OF OPINION, BY 15 VOTES TO 1, THAT THERE WERE LEGAL TIES
BETWEEN THIS TERRITORY AND THE MAURITANIAN ENTITY OF THE KINDS
INDICATED IN THE PENULTIMATE PARAGRAPH OF THE ADVISORY OPINION.

THE PENULTIMATE PARAGRAPH OF THE ADVISORY OPINION IS TO THE
EFFECT THAT;

THE MATERIALS AND INFORMATION PRESENTED TO THE COURT
SHOW THE EXISTENCE, AT THE TIME OF SPANISH COLONIZATION, OF
LEGAL TIES OF ALLEGIANCE BETWEEN THE SULTAN OF MOROCCO AND
SOME OF THE TRIBES LIVING IN THE TERRITORY OF WESTERN SAHARA.
THEY EQUALLY SHOW THE EXISTENCE OF RIGHTS, INCLUDING SOME
RIGHTS RELATING TO THE LAND, WHICH CONSTITUTED LEGAL TIES
BETWEEN THE MAURITANIAN ENTITY, AS UNDERSTOOD BY THE COURT,
AND THE TERRITORY OF WESTERN SAHARA. ON THE OTHER HAND, THE
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COURT'S CONCLUSION IS THAT THE MATERIALS AND INFORMATION
PRESENTED TO IT DO NOT ESTABLISH ANY TIE OF TERRITORIAL
SOVEREIGNTY BETWEEN THE TERRITORY OF WESTERN SAHARA AND THE
KINGDOM OF MOROCCO OR THE MAURITANIAN ENTITY. THUS THE COURT
HAS NOT FOUND LEGAL TIES OF SUCH A NATURE AS MIGHT AFFECT THE
APPLICATION OF GENERAL ASSEMBLY RESOLUTION 1514 (XV) IN THE
DECOLONIZATION OF WESTERN SAHARA AND, IN PARTICULAR, OF THE
PRINCIPLE OF SELF-DETERMINATION THROUGH THE FREE AND GENUINE
EXPRESSION OF THE WILL OF THE PEOPLES OF THE TERRITORY.

FOR THESE PROCEEDING THE COURT WAS COMPOSED AS FOLLOWS:
PRESIDENT LACHS; VICE-PRESIDENT AMMOUN; JUDGES FORSTER, GROS,
BENZON, PETREN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO,

MOROZOV, JIMENEZ DE ARECHAGA, SIR HUMPHREY WALDOCK, NAGENDRA SINGH
AND
RUDA; JUDGE AD HOC BONI.

JUDGES GROS, IGNACIO-PINTO AND NAGENDRA SINGH APPENDED
DECLARATIONS TO THE ADVISORY OPINION; VICE-PRESIDENT AMMOUN AND
JUDGES FORSTER, PETREN, DILLARD, DE CASTRO AND BONI APPENDED
SEPARATE OPINIONS, AND JUDGE RUDA A DISSENTING OPINION.

IN THESE DECLARATIONS AND OPINIONS THE JUDGES CONCERNED MAKE
CLEAR AND EXPLAIN THEIR POSITIONS.

AN ANALYSIS OF THE ADVISORY OPINION IS GIVEN BELOW. IT HAS
BEEN PREPARED BY THE REGISTRY FOR THE USE OF THE PRESS AND IN NO
WAY INVOLVES THE RESPONSIBILITY OF THE COURT. IT CANNOT BE QUOTED
AGAINST THE ACTUAL TEXT OF THE ADVISORY OPINION, OF WHICH IT DOES NOT
CONSTITUTE AN INTERPRETATION.

ANALYSIS OF THE ADVISORY OPINION

COURSE OF THE PROCEEDING (PARAGRAPHS 1-13 OF ADVISORY OPINION)

THE COURT FIRST RECALLS THAT THE GENERAL ASSEMBLY OF THE
UNITED NATIONS DECIDED TO SUBMIT TWO QUESTIONS FOR THE COURT'S
ADVISORY OPINION BY RESOLUTION 3292 (XXIX) ADOPTED ON 13 DECEMBER
1974 AND
RECEIVED IN THE REGISTRY ON 21 DECEMBER. IT RETRACES THE
SUBSEQUENT STEPS IN THE PROCEEDINGS, INCLUDING THE TRANSMISSION OF
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A DOSSIER OF DOCUMENTS BY THE SECRETARY-GENERAL OF THE UNITED NATIONS
(STATUTE, ART 65, PARA 2) AND THE PRESENTATION OF WRITTEN STATEMENTS
OR LETTERS AND/OR ORAL STATEMENTS BY 14 STATES, INCLUDING ALGERIA,
MAURITANIA, MOROCCO, SPAIN AND ZAIRE (STATUTE, ART 66).

MAURITANIA AND MOROCCO EACH ASKED TO BE AUTHORIZED TO CHOOSE A
JUDGE AD HOC TO SIT IN THE PROCEEDINGS. BY AN ORDER OF 22 MAY 1975
(I.C.J. REPORTS 1975, P.6), THE COURT FOUND THAT MOROCCO WAS ENTITLED
UNDER ARTICLES 31 AND 68 OF THE STATUTE AND ARTICLE 89 OF THE RULES
OF COURT TO CHOOSE A PERSON TO SIT AS JUDGE AD HOC, BKT THET, IN THE
CASE OF MAURITANIA, THE CONDITIONS FOR THE APPLICATION OF THOSE
ARTICLES HAD NOT BEEN SATISFIED. AT THE SAME TIME THE COURT STATED
THAT THOSE CONCLUSIONS IN NO WAY PREJUDGED ITS VIEW WITH REGARD TO
THE QUESTIONS REFERRED TO IT OR ANY OTHER QUESTION WHICH MIGHT FALL
TO BE DECIDED, INCLUDING THOSE OF ITS COMPETENCE TO GIVE AN ADVISORY
OPINION AND THE PROPRIETY OF EXERCISING THAT COMPETENCE.

COMPETENCE OF THE COURT (PARAGRAPHS 14-22 OF ADVISORY OPINION)

UNDER ARTICLE 15, PARAGRAPH 1, OF THE STATUTE, THE COURT MAY
GIVE AN ADVISORY OPINION ON ANY LEGAL QUESTION AT THE REQUEST OF ANY
DULY AUTHORIZED BODY. THE COURT NOTES THAT THE GENERAL ASSEMBLY OF

THE UNITED NATIONS IS SUITABLY AUTHORIZED BY ARTICLE 96, PARAGRAPH 1, OF THE CHARTER AND THAT THE TWO QUESTIONS SUBMITTED ARE FRAMED IN TERMS OF LAW AND RAISE PROBLEMS OF INTERNATIONAL LAW. THEY ARE IN PRINCIPLE QUESTIONS OF A LEGAL CHARACTER, EVEN IF THEY ALSO EMBODY QUESTIONS OF FACT, AND EVEN IF THEY DO NOT CALL UPON THE COURT TO PRONOUNCE ON EXISTING RIGHTS AND OBLIGATIONS. THE COURT IS ACCORDING COMPETENT TO ENTERTAIN THE REQUEST.

PROPRIETY OF GIVING AN ADVISORY OPINION (PARAGRAPHS 23-74 OF ADVISORY OPINION)

SPAIN PUT FORWARD OBJECTIONS WHICH IN ITS VIEW WOULD RENDER THE GIVING OF AN OPINION INCOMPATIBLE WITH THE COURT'S JUDICIAL CHARACTER. IT REFERRED IN THE FIRST PLACE TO THE FACT THAT IT HAD NOT GIVEN ITS CONSENT TO THE COURT'S ADJUDICATING UPON THE QUESTIONS SUBMITTED. IT MAINTAINED (A) THAT THE SUBJECT OF THE QUESTIONS WAS SUBSTANTIALLY IDENTICAL TO THAT OF A DISPUTE CONCERNING WESTERN SAHARA WHICH MOROCCO, IN SEPTEMBER 1974, HAD INVITED IT TO SUBMIT JOINTLY TO THE COURT, A PROPOSAL WHICH IT HAD REFUSED: THE UNCLASSIFIED

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ADVISORY JURISDICTION WAS THEREFORE BEING USED TO CIRCUMVENT THE PRINCIPLE THAT THE COURT HAS NO JURISDICTION TO SETTLE A DISPUTE WITHOUT THE CONSENT OF THE PARTIES; (B) THAT THE CASE INVOLVED A DISPUTE CONCERNING THE ATTRIBUTION OF TERRITORIAL SOVEREIGNTY OVER WESTERN SAHARA AND THE CONSENT OF STATES WAS ALWAYS NECESSARY FOR THE ADJUDICATION OF SUCH DISPUTES; (C) THAT IN THE CIRCUMSTANCES OF THE CASE THE COURT COULD NOT FULFILL THE REQUIREMENTS OF GOOD ADMINISTRATION OF JUSTICE WITH REGARD TO THE DETERMINATION OF THE FACTS. THE COURT CONSIDERS (A) THAT THE GENERAL ASSEMBLY, WHILE NOTING THAT A LEGAL CONTROVERSY OVER THE STATUS OF WESTERN SAHARA

HAD ARISEN DURING ITS DISCUSSIONS, DID NOT HAVE THE OBJECT OF BRINGING BEFORE THE COURT A DISPUTE OR LEGAL CONTROVERSY WITH A VIEW TO ITS SUBSEQUENT PEACEFUL SETTLEMENT, BUT SOUGHT AN ADVISORY OPINION WHICH WOULD BE OF ASSISTANCE IN THE EXERCISE OF ITS FUNCTIONS CONCERNING THE DECOLONIZATION OF THE TERRITORY, HENCE THE LEGAL POSITION OF SPAIN COULD NOT BE COMPROMISED BY THE COURT'S ANSWERS TO THE QUESTIONS SUBMITTED; (B) THAT THOSE QUESTIONS DO NOT CALL UPON THE COURT TO ADJUDICATE ON EXISTING TERRITORIAL RIGHTS; (C) THAT IT HAS BEEN PLACED IN POSSESSION OF SUFFICIENT INFORMATION AND EVIDENCE.

SPAIN SUGGESTED IN THE SECOND PLACE THAT THE QUESTIONS SUBMITTED TO THE COURT WERE ACADEMIC AND DEVOID OF PURPOSE OR PRACTICAL EFFECT, IN THAT THE UNITED NATIONS HAD ALREADY SETTLED THE METHOD TO BE FOLLOWED FOR THE DECOLONIZATION OF WESTERN SAHARA, NAMELY A CONSULTATION OF THE INDIGENOUS POPULATION BY MEANS OF A REFERENDUM TO BE CONDUCTED BY SPAIN UNDER UNITED NATIONS AUSPICES. THE COURT EXAMINES THE RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY ON THE SUBJECT, FROM RESOLUTION 1514 (XV) OF 14 DECEMBER 1960, THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND

PEOPLES, TO RESOLUTION 3292 (XIX) ON WESTERN SAHARA, EMBODYING THE REQUEST FOR ADVISORY OPINION. IT CONCLUDES THAT THE DECOLONIZATION PROCESS ENVCSAGED BY THE GENERAL ASSEMBLY IS ONE WHICH WILL RESPECT THE RIGHT OF THE POPULATION OF WESTERN SAHARA TO DETERMINE THEIR FUTURE POLITICAL STATUS BY THEIR OWN FREELY EXPRESSED WILL. THIS RIGHT TO SELF-DETERMINATION, WHICH IS NOT AFKECTED BYTHE REQUEST FOR ADVISORY OPINION AND CONSTITUTES A BASIC ASSUMPTION OF THE QUESTIONS PUT TO THE COURT, LEAVES THE GENERAL ASSEMBLY A MEASKRE OF DISCRETION WITH RESPECT TO THE FORMS AND PROCEDURES BY WHICH IT IS TO BE REALIZED. THE ADVISORY OPINION WILL THUS FURNISH THE ASSEMBLY UNCLASSIFIED

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WITH ELEMENTS OF A LEGAL CHARACTER RELEVANT TO THAT FURTHER DIUCUSSION OF THE PROBLEM TO WHICH RESOLUTION 3292 (XXIX) ALLUDES.

CONSEQUENTLY THE COURT FINDS NO COMPELLING REASON FOR REFUSING TO GIVE A REPLY TO THE TWO QUESTIONS SUBMCTTED TO IT IN THE REQUEST FOR ADVISORY OPINION.

QUESTION I: "WAS WESTERN SAHARA (RIO DE ORO AND SAKIET EL HAMRA) AT THE TIME OF COLONIZATION BY SPAIN A TERRITORY BELONGING TO NO ONE (TERRA NULLIUS)?" (PARAGRAPHS 75-83 OF ADVISORY OPINION)

FOR THE PURPOSES OF THE ADVISORY OPINION, THE "TIME OF COLONIZATION BY SPAIN" MAY BE CONSIDERED AS THE PERIOD BEGINNING IN 1884, WHEN SPAIN PROCLAIMED ITS PROTECTORATE OVER THE RIO DE ORO. IT IS THEREFORE BY REFERENCE TO THE LAW IN FORCE AT THAT PERIOD THAT THE LEGAL CONCEPT OF TERRA NULLIUS MUST BE INTERPRETED. IN LAW, "OCCUPATION" WAS A MEANS OF PEACEABLY ACQUIRING SOVEREIGNTY OVER TERRITORY OTHERWISE THAN BY CESSION OR SUCCESSION; IT WAS A CARDINAL CONDITION OF A VALID "OCCUPATION" THAT THE TERRITORY SHOULD BE TERRA NULLIUS. ACCORDING TO THE STATE PRACTICE OF THAT PERIOD, TERRITORIES INHABITED BQ TRIBES OR PEOPLES HAVING A SOCIAL AND POLITICAL ORGANIZATION WERE NOT REGARDED AS TERRAE NULLIUS: IN THEIR CASE SOVEREIGNTY WAS NOT GENERALLY CONSIDERED AS EFFECTED THROUGH OCCUPATION, BUT THROUGH AGREEMENTS CONCLUDED WITH LOCAL RULERS. THE INFORMATION FURNISHED TO THE COURT SHOWS (A) TH T AT THE TIME OF COLONIZATION WESTERN SAHARA WAS INHABITED BY PEOPLES WHICH, IF NOMADIC, WERE SOCIALLY AND POLITICALLY ORGANIZED IN TRIBES AND UNDER CHIEFS COMPETENT TO REPRESENT THEM; (B) THAT SPAIN DID NOT PROCEED UPON THE BASIS THAT IT WAS ESTABLISHING ITS SOVEREIGNTY OVER TERRA NULLCSS: THUS IN HIS ORDER OF 26 DECEMBER 1884 THE KING OF SPAIN PROCLAIMED THAT HE WAS TAKING THE RIO DE ORO UNDER HIS PROTECTION ON THE BASIS OF AGREEMENTS ENTERED INTO WITH THE CHIEFS OF LOCAL TRIBES.

THE COURT THEREFORE GIVES A NEGATIVE ANSWER TO QUESTION I. IN ACCORDANCE WITH THE TERMS OF THE REQUEST FOR ADVISORY OPINION, "IF THE ANSWER TO THE FIRST QUESTION IS IN THE NEGATIVE", THE COURT IS TO REPLY TO QUESTION II.

QUESTION II: "WHAT WERE THE LEGAL TIES OF THIS TERRITORY WITH THE
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KINGDOM OF MOROCCO AND THE MAURITANIAN ENTITY?" (PARAGRAPHS 84-111
OF ADVISORY OPINION)

THE MEANING OF THE WORDS "LEGAL TIES" HAS TO BE SOUGHT IN THE
OBJECT AND PURPOSE OF RESOLUTION 3292 (XXIX) OF THE UNITED NATIONS
GENERAL ASSEMBLY. IT APPEARS TO THE COURT THAT THEY MUST BE
UNDERSTOOD AS REFERRING TO SUCH LEGAL TIES AS MAY AFFECT THE POLICY
TO BE FOLLOWED IN THE DECOLONIZATION OF WESTERN SAHARA. THE COURT
CANNOT ACCEPT THE VIEW THAT THE TIES IN QUESTION COULD BE LIMITED
TO TIES ESTABLISHED DIRECTLY WITH THE TERRITORY AND WITHOUT REFERENCE
TO THE PEOPLE WHO MAY BE FOUND IN IT. AT THE TIME OF ITS
COLONIZATION

THE TERRITORY HAD A SPARSE POPULATION THAT FOR THE MOST PART
CONSISTED OF NOMADIC TRIBES THE MEMBERS OF WHICH TRAVERSED THE
DESERT ON MORE OR LESS REGULAR ROUTES, SOMETIMES REACHING AS FAR AS
SOUTHERN MOROCCO OR REGIONS OF PRESENT-DAY MAURITANIA, ALGERIA OR
OTHER STATES. THESE TRIBES WERE OF THE ISLAMIC FAITH.

MOROCCO (PARAGRAPHS 90-129 OF THE ADVISORY OPINION) PRESENTED
ITS CLAIM TO LEGAL TIES WITH WESTERN SAHARA AS A CLAIM TO TIES OF
SOVEREIGNTY ON THE GROUND OF AN ALLEGED IMMEMORIAL POSSESSION OF THE
TERRITORY AND AN UNINTERRUPTED EXERCISE OF AUTHORITY IN THE VIEW
OF THE COURT, HOWEVER, WHAT MUST BE OF DECISIVE IMPORTANCE IN
DETERMINING ITS ANSWER TO QUESTION II MUST BE EVIDENCE DIRECTLY
RELATING TO EFFECTIVE DISPLAY OF AUTHORITY IN WESTERN SAHARA AT THE
TIME OF ITS COLONIZATION BY SPAIN AND IN THE PERIOD IMMEDIATELY
PRECEDING. MOROCCO REQUESTS THAT THE COURT SHOULD TAKE ACCOUNT OF
THE SPECIAL STRUCTURE OF THE MOROCCAN STATE. THAT STATE WAS FOUNDED
ON THE COMMON RELIGIOUS BOND OF ISLAM AND ON THE ALLEGIANCE OF
VARIOUS
TRIBES TO THE SULTAN, THROUGH THEIR CAIDS OR SHEIKHS, RATHER THAN ON
THE NOTION OF TERRITORY. IT CONSISTED PARTLY OF WHAT WAS CALLED THE
BLAD MAKHZEN, AREAS ACTUALLY SU³:5 59 5#3 7)5-., AND PARTLY OF
WHAT WAS CALLED THE BLAD SIBA, AREAS IN WHICH THE TRIBES WERE NOT
SUBMISSIVE TO HIM; AT THE RELEVANT PERIOD, THE AREAS IMMEDIATELY TO
THE NORTH OF WESTERN SAHARA LAY WITHIN THE BLAD SIBA.

AS EVIDENCE OF ITS DISPLAY OF SOVEREIGNTY IN WESTERN SAHARA,
MOROCCO INVOKED ALLEGED ACTS OF INTERNAL DISPLAY OF MOROCCAN
AUTHORITY, CONSISTING PRINCIPALLY OF EVIDENCE SAID TO SHOW THE
ALLEGIANCE OF SAHARAN CAIDS TO THE SULTAN, INCLUDING DAHIRS AND OTHER
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DOCUMENTS CONCERNING THE APPOINTMENT OF CAIDS, THE ALLEGED IMPOSITION
OF KORANIC AND OTHER TAXES, AND ACTS OF MILITARY RESISTANCE TO
FOREIGN
PENETRATION OF THE TERRITORY. MOROCCO ALSO RELIED ON CERTAIN

INTERNATIONAL ACTS SAID TO CONSTITUTE RECOGNITION BY OTHER STATES OF ITS SOVEREIGNTY OVER THE WHOLE OR PART OF WESTERN SAHARA, INCLUDING (A) CERTAIN TREATIES CONCLUDED WITH SPAIN, THE UNITED STATES AND GREAT BRITAIN AND SPAIN BETWEEN 176(AND 1861, PROVISIONS OF WHICH DSALT INTER ALIA WITH THE SAFETY OF PERUONS SHIPWRECKED ON THE COAST OF WAD NOUN OR ITS VICINITY; (B) CERTAIN BILATERAL TREATIES OF THE LATE NINETEEN AND EARLY TWENTIETH CENTURIES WHEREBY GREAT BRITAIN, SPAIN, FRANCE AND GERMANY WERE SAID TO HAVE RECOGNIZED THAT MOROCCAN SOVERIEGNTY EXTENDED AS FAR SOUTH AS CAPE BOJADOR OR THE BOUNDARY OF THE RIO DE ORO.

HAVING CONSIDERED THIS EVIDENCE AND THE OBSERVATIONS OF THE OTHER STATES WHICH TOOK PART IN THE PROCEEDINGS, THE COURT FINDS THAT NEITHER THE INTERNAL NOR THE INTERNATIONAL ACTS RELIED UPON BY MOROCCO INDICATE THE EXISTENCE AT THE RELEVANT PERIOD OF EITHER THE EISTENCE OR THE INTERNATIONAL RECOGNITION OF LEGAL TIES OF TERRITORIAL SOVEREIGNTY BETWEEN WESTERN SAHARA AND THE MOROCCAN STATE. EVEN TAKING ACCOU
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